IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE THE CHIEF JUSTICE MR.H.L.DATTU
&
THE HONOURABLE MR. JUSTICE K.T.SANKARAN

WEDNESDAY, THE 8TH AUGUST 2007 / 17TH SRAVANA 1929

OP.No. 28931 of 2002(S)

PETITIONERS:
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1. DR. P.P. BALAKRISHNAN, S/O.ONAKKAN VAIDYAR, AGED 74 YEARS, RESIDING AT 'AMRITHA', CUSTOMS ROAD, VADAKARA AMSOM, DESOM, VATAKARA TALUK.

2. P.C.A. KUNHAMMED, S/O. O.V. UMMERKUTTY, AGED 53 YEARS, SECRETARY SANTHI NIKETHAN CHARITABLE TRUST, CUSTOMS ROAD, VADAKARA AMSOM, DESOM, VADAKARA TALUK.

3. K.V. SASIDHARAN, S/O. K.V. CHEEKU, AGED 51 YEARS, ADVOCATE, CUSTOMS ROAD, VADAKARA AMSOM, DESOM, VADAKARA TALUK.

4. N.P. MAHAMOOD, S/O. MOIDU HAJI, 56 YEARS, RETD. PROFESSOR, CUSTOMS ROAD, VADAKARA AMSOM, DESOM, VADAKARA TALUK.

5. HAMSA MUKKOLAKKAL, S/O. N.V. IBRAHIM HAJI, 47 YEARS, BUSINESS, 'NIKUNJAM', CUSTOMS ROAD, VADAKARA AMSOM, DESOM, VADAKARA TALUK.

BY ADV. SRI.B.KRISHNAN
SRI.R.K.MURALEEDHARAN

RESPONDENTS:
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1. VADAKARA MUNICIPALITY REPRESENTED BY CHAIRPERSON, VADAKARA MUNICIPALITY, VADAKARA.

2. THE SECRETARY, VADAKARA MUNICIPALITY, VADAKARA.

3. STATE OF KERALA REPRESENTED BY SECRETARY, LOCAL ADMINISTRATION DEPARTMENT, GOVT. OF KERALA, THIRUVANANTHAPURAM.

4. ABDUL MAJEED, AGED 46 YEARS,
ANGEPEEDIKAYIL HOUSE, BEACH ROAD,
VADAKARA AMSOM, DESOM, VADAKARA TALUK.

5. PERINGADIVAYAL SUHARA,
W/O. A.P. MAHAMOOD, AGED 47 YEARS,
PERINGADIVAYALIL, BEACH ROAD, VADAKARA.

R1 & R2 BY STANDING COUNSEL MR.VIJAYA MOHAN
R3 BY SR.GOVERNMENT PLEADER SMT.MEERA
R5 BY ADV. SRI.S.V.BALAKRISHNA IYER
SRI.P.B.KRISHNAN
SRI.P.C.SASIDHARAN
SRI.C.P.MOHAMMED NIAS
SMT.P.K.SHAKKEELA

THIS ORIGINAL PETITION HAVING BEEN FINALLY HEARD ON 08/08/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

PETITIONERS' EXHIBITS:

EXT.P1 TRUE COPY OF THUMBNAIL SKETCH SHOWING THE POSITIONS OF CUSTOMS ROAD, RAILWAY GATE JUBILEE TANK ROAD, KANNUR-KOZHIKODE N.H.ETC.

EXT.P2 TRUE COPY OF THE PROCEEDINGS OF THE GOVT. OF KERALA DTD.4.12.2001

EXT.P3 TRUE COPY OF THE NEWS ITEM IN MATHRUBHOOMI DAILY DATED 20TH SEPT. 2002.

EXT.P4 TRUE COPY OF A NEWS ITEM IN MADHYAMAM DAILY DT.20TH SEPT. 2002.

EXT.P5 TRUE COPY OF A NEWS ITEM IN MALAYALA MANORAMA DT.18.9.2002

EXT.P6TRUE COPY OF A NEWS ITEM IN MATHRUBHOOMI DAILY DTD.6.9.2002

RESPONDENTS' EXHIBITS:

EXT.R2(A) TRUE COPY OF COMMUNICATION DATED 24.3.1997 ISSUED TO RESPONDENTS 4 AND 5 BY THE MUNICIPALITY.

EXT.R2(B) TRUE COPY OF ENGLISH TRANSLATION OF EXT.R2(A)

EXT.R2(C) TRUE COPY OF THE RESOLUTION PASSED BY THE VADAKARA MUNICIPAL COUNCIL ON 24.6.1999

EXT.R2(D) TRUE COPY OF THE ENGLISH TRANSLATION OF EXT.R2(C)

EXT.R2(E)TRUE COPY OF THE JUDGMENT DATED 5.9.2005 IN O.P.NO.36647/2001

EXT.R5(A) TRUE COPY OF BUILDING PERMIT DATED 31.12.2001 ISSUED BY THE 1ST RESPONDENT.

EXT.R5(B) TRUE COPY OF THE BUILDING PERMIT DATED 21.1.2002 ISSUED BY THE 1ST RESPONDENT.

/ TRUE COPY /

H.L.DATTU, C.J. & K.T.SANKARAN, J.

O.P.No.28931 of 2002

Dated, this the 8th day of August, 2007

JUDGMENT

K.T.Sankaran, J.

Petitioners are residents of Ward No.2 of Vadakara Municipality. The prayers made in the writ petition are the following:

> "i) issue a writ of certiorari or such other writ or order quashing the original of Ext.P2 and;
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> ii) issue a writ of mandamus or such other writ or order directing the 1st respondent to stop construction work undertaken by respondents 4 and 5 following the original of Ext.P2 and;
>
> iii) issue such other writ or order, which this Hon'ble Court deems fit in the circumstances of the case."

2. Ext.P2 is a Government order dated 4.12.2001 by which the Government in consultation with the Local Authority and Chief Town Planner exempted the construction of a residential building in R.S.No.132/9, 2C in Ward No.3 of Vadakara Municipality in Kozhikode District by respondents 4 and 5. The petitioners have amended the writ petition stating that after the writ petition was filed by them, respondents 4 and 5 have constructed a residential building in the plot belonging to them. One of the prayers in the amended writ petition is to demolish the construction made by respondents 4 and 5 in the said property.

3. Learned counsel appearing for the petitioners submits that Ext.P2 order is not legally sustainable as the Government have no power to grant such exemption. In support of his contention he relied on a Division Bench decision of this Court reported in *Sayeesh Kumar & Others* v. *State of Kerala & Others* (2005 (3) KLJ 590), wherein it is held as follows:

> "We are of the view, Town Planning Act confers no power on the Government to tamper with the approved development scheme. Government have no power to grant individual exemption. Section 13 of the Town Planning Act only enables the Government to revoke the scheme as such and not to grant individual exemption orders. In our view, the action of the Government granting exemption is arbitrary and without authority of law. We are of the view once the development scheme has been approved and published in the Gazette stating that a particular area has been earmarked as residential zone, the Government cannot tinker with the same and grant permission for construction of a non-residential building in a residential zone."

4. In the counter affidavit filed by the Secretary of the Vadakara Municipality, it is stated that the Municipality had taken a decision to delete the proposed road from the revised master plan. The case of the petitioners is that an over-bridge was constructed and the area where now respondents 4 and 5 have constructed a residential building is required for constructing approach road to that over-bridge. It is the stand of the Municipality that the property of respondents 4 and 5 is not required at present for the purpose of constructing approach road.

5. This is a public interest litigation. No rights of the petitioners are affected by the grant of Ext.P2 order. Leaving open the contentions of the petitioners that Ext.P2 is not legally sustainable and also leaving open all the contentions that could be put forward on the legality of Ext.P2, in view of the subsequent developments and in view of the stand taken by the Municipality, we do not propose to grant the reliefs prayed for in the writ petition.

6. The original petition is accordingly disposed of as follows:

i) All the contentions of the petitioners as regards legality or otherwise of Ext.P2 order dated 4.12.2001 are left open to be decided in appropriate proceedings.

ii) The question whether respondents 4 and 5 could rely on Ext.P2 to legalize the construction made by them in their property is also left open.

iii) The reliefs sought for in the original petition are declined in view of the subsequent developments and in view of the fact that no proprietory rights of the petitioners or any other person are affected by the construction at present.

iv) This order will not stand in the way of the Municipality or any other authority from taking appropriate decision for alignment of the approach road in future.

Consequently, C.M.P.No.49171 of 2002 is also dismissed.

(**H.L.DATTU)**
CHIEF JUSTICE

(K.T.SANKARAN)
JUDGE

vns